In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-542

ROBERT H. SLATKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After one day of trial in the United States District Court for the Southern District of Florida, petitioner entered a plea of nolo contendere to having willfully failed to file an income tax return for 1963, and a plea of guilty to having willfully failed to file income tax returns for 1964 and 1965, all misdemeanors in violation of 26 U.S.C. 7203. (The government dismissed four felony counts under 26 U.S.C. 7201 and 7206(1) charging attempted willful tax evasion and the filing of false returns under the penalties of perjury for the years 1964 and 1965.) Petitioner was sentenced to concurrent terms of imprisonment for four months on

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the second and third counts and was placed on probation for three years on the first count. The district court denied petitioner's subsequent motion to withdraw his pleas and to enjoin prosecution on the felony counts. The court of appeals affirmed (Pet. App. 7).

On January 5, 1970, an information was filed against petitioner, an attorney, charging him with three misdemeanor violations of 26 U.S.C. 7203, for willful failure to file timely income tax returns for the years 1963, 1964 and 1965. On May 15, 1970, petitioner entered pleas of not guilty to the three-count information. While the attorneys in the United States Attorney's office and the Department of Justice were reviewing the case in preparation for trial, the chief prosecutor concluded that there was cause to believe that petitioner was guilty not only of the misdemeanors but also of four felonies of willfully attempting to evade tax and of willfully making and subscribing false tax returns (Tr. 39, 40, 52, 53).[1] The grand jury subsequently indicted petitioner on those four counts (Pet. App. 2).

Between the time of indictment and the first day of trial, June 7, 1971, petitioner approached the government on several occasions with offers to plead guilty to two of the misdemeanor counts, provided the other

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[1] "Tr." refers to the court reporter's Transcript of Proceedings, November 23, 1971, a copy of which is being lodged herewith.

Prior to transfer of the case to the United States Attorney's Office for the Southern District of Florida, differing recommendations had been made, pro and con, as to the institution of a felony prosecuted, by the investigating special agent, and the reviewing authorities at the Internal Revenue Service and the Tax Division of the Justice Department (Tr. 65-69).

counts were dismissed (Tr. 36, 54, 55). These offers were rejected because of the long-standing policy of the Department of Justice and the United States Attorney's office not to accept guilty pleas only to misdemeanors when felony and misdemeanor charges are joined (Tr. 56, 57). Prior to the trial, the government initiated no negotiations with reference to any plea by petitioner (Tr. 54, 55).

On June 8, 1971, after one day of trial, the government acceded to petitioner's offer to plead nolo contendere to the 1963 misdemeanor charge and guilty to the 1964 and 1965 misdemeanor charges in exchange for dismissal of the felony counts (Tr. 62-65). After a full hearing in accordance with Rule 11, Fed. R. Crim. P., petitioner's pleas were accepted by the district court (Pet. App. 2).

Prior to execution of the sentence, mandatory grievance proceedings were brought against petitioner by the Florida Bar Grievance Committee on the basis of the misdemeanor convictions (Pet. App. 3). Petitioner thereupon moved in the sentencing court to withdraw his guilty pleas and to bar prosecution of the felony charges, alleging that the testimony of the chief prosecutor, Jose Martinez, during the Florida Bar proceedings revealed that the government had brought the felony charges because petitioner was unwilling to plead guilty to the earlier misdemeanor charges (Pet. App. 3).

After an evidentiary hearing on November 23, 1971, the district court denied the motion (Pet. App. 3), the court of appeals subsequently affirmed (Pet. App. 7), and rehearing was denied (Pet. App. 8).

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There is no reason for further review of this case. Petitioner's basic contention is that he was unfairly induced by the subsequent indictment on felony charges to change his original pleas of not guilty to the misdemeanor charges.

But petitioner does not dispute that his pleas of guilty were entered in accordance with Rule 11, Fed. R. Crim. P. (Tr. 11; Pet. 5). Petitioner further admits that he offered his guilty pleas to free himself of the possibility of a felony conviction (Tr. 11; Pet. 17), in other words, that he concluded that an admission of guilt and avoidance of a full trial on the merits was in his best interests. In these circumstances, his anticipation of a possible felony conviction did not vitiate petitioner's "free and rational choice." *North Carolina* v. *Alford,* 400 U.S. 25, 31.

Petitioner's claim (Pet. 11-14) that the government brought the felony indictment in order to induce him to change his pleas to the misdemeanor charges is without merit. As the district court found, petitioner's prior "failure to indicate any willingness to enter a guilty plea * * * had absolutely nothing to do with the bringing of the felony charges" (Pet. App. 3). Martinez testified at the hearing on petitioner's motion that the paramount factor in the government's decision to bring the felony charges was the good faith belief that the evidence showed petitioner was guilty of the felonies (Tr. 39, 40, 52, 53) and that the felony charges were warranted (Tr. 27, 29, 37, 38). Petitioner apparently does not challenge the prosecutor's judgment on the issue of whether the evidence could support a felony conviction; indeed, petitioner's willingness to

enter into a "plea bargain" indicated his belief that a felony conviction was at least a significant possibility. In these circumstances the felony indictments represented an appropriate exercise of prosecutorial discretion, especially in light of the fact that the felony charges and the ongoing misdemeanor prosecutions involved related issues of fact and law which could be appropriately tried together.

On this record the trial court properly exercised its discretion in denying petitioner's motion. See *United States* v. *Spragg*, 439 F. 2d 800 (C.A. 5).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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